BOARD OF INQUIRY (*Human Rights Code*)

IN THE MATTER OF the Ontario *Human Rights Code*, R.S.O. 1990, c. H.19, as amended;

AND IN THE MATTER OF the complaint by Alicia Payne dated May 8, 1995 and amended on November 19, 1996, alleging discrimination in employment on the basis of race, colour, ancestry and ethnic origin.

B E T W E E N :

Ontario Human Rights Commission

- and -

Alicia Payne

Complainant

- and -

Otsuka Pharmaceutical Co. Ltd. and Minoru Okada

Respondents

- and -

Metro Toronto Convention Centre, XXVIIth International Congress of Ophthalmology, Canadian Ophthalmological Society, Intertask Group of Companies, Paul Akehurst (Sr.), Leanne Akehurst, Hubert Drouin and Manpower Services Canada Limited

Respondents on the Motion

INTERIM DECISION

Adjudicator : Matthew D. Garfield

Date : October 24, 2001

Board File No: BI-0201-98

Decision No : 01-023-I

Board of Inquiry (*Human Rights Code*)
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APPEARANCES

Ontario Human Rights Commission	)	Prabhu Rajan, Counsel
Alicia Payne, Complainant	)	On her own behalf
Metro Toronto Convention Centre, Respondent	)	Clifford J. Hart, Counsel
XXVIIth International Congress of Ophthalmology, Canadian Ophthalmological Society, Intertask Group of Companies, Paul Akehurst (Sr.), Leanne Akehurst and Hubert Drouin	)	François Baril, Counsel
Manpower Services Canada Limited	)	Neil Ornstein, Counsel

INTRODUCTION

These are the Board's Reasons for Decision on a motion brought by the Complainant, Alicia Payne, to add eight party respondents to the proceeding before the Board of Inquiry ("Board"). The case on the merits involves a Complaint filed on May 8, 1995 by Ms Payne alleging discrimination in employment on the prohibited grounds of race, colour, ancestry and ethnic origin. Ms Payne alleges that Otsuka Pharmaceutical Co. Ltd. ("Otsuka"), a company operating in Japan, and its executive Minoru Okada, refused to employ her in Otsuka's exhibit booth at the 27th International Congress of Ophthalmology ("ICO") held in Toronto in June, 1994.

Otsuka and Okada were not named in Ms Payne's original Complaint: Intertask Group of Companies ("Intertask"), Paul Akehurst and Leanne Akehurst (both employed by Intertask and holding positions with the ICO), ICO and the Canadian Ophthalmological Society ("COS") were listed as respondents on her complaint form filed with the Ontario Human Rights Commission ("Commission"). On November 19, 1996, the Complainant filed an Amended Complaint adding Otsuka, Okada and the Metro Toronto Convention Centre ("MTCC") as respondents.

Two of the parties she wishes to add, Hubert Drouin, Chief Executive Officer and Executive Director of COS, and Manpower Services Canada Limited ("Manpower") were neither named nor referred to in either the Original or Amended Complaints.

The Commission investigated the matter and decided to "refer the subject-matter of the complaint" to the Board in 1998 but only as against two of the eight respondents: Otsuka and Okada. Pursuant to subsection 36(2) of the *Human Rights Code*, R.S.O. 1990, c. H.19, as amended ("*Code*"), the Commission declined to refer as against the six other respondents named in Ms Payne's Original and Amended Complaints - COS, ICO, Intertask, Paul Akehurst, Leanne Akehurst and MTCC ("Remainder Respondents"). The Commission subsequently denied Ms Payne's request for reconsideration pursuant to section 37.

Ms Payne moved to add the six Remainder Respondents, Mr. Drouin and Manpower. The Board heard the motion in 1999 and ruled that it lacked the jurisdiction under the *Code* to add the Remainder Respondents as parties. The Board did not deal with the motion as it related to Mr. Drouin and Manpower as the Complainant had failed to provide them with notice of her motion.

Ms Payne filed an application for judicial review of the Board's decision. The Divisional Court reversed the Board's decision (reported at [2000] O.J. No. 1896). The Court held that the Board did have the jurisdiction to consider adding the Remainder Respondents pursuant to subsections 39(2) and (3) and remitted the matter back to the Board to consider the question in that light. The Court also stated that it was unnecessary to deal with the constitutional issues raised by Ms Payne (which were not raised in her motion before the Board) and that the Board was within its power not to have heard the motion as against Mr. Drouin and Manpower as they had not been given notice.

Ms Payne sought leave to appeal the decision to the Court of Appeal for Ontario. That Court denied leave in October, 2000. She then sought leave to appeal to the Supreme Court of Canada and that Court dismissed her request with costs in March, 2001. She then brought her motion to the Board to add the Remainder Respondents, Mr. Drouin and Manpower.

Specifically, Ms Payne seeks in her Notice of Motion an Order:
(1) adding the Remainder Respondents, Mr. Drouin and Manpower as parties; and
(2) amending the Amended Complaint to include allegations against Mr. Drouin and Manpower.

ISSUES

The Board deals with the following issues:

(1) Does it "appear" that each of the Remainder Respondents, Mr. Drouin and Manpower infringed Ms Payne's rights contrary to the *Code* and should be added as parties?

(2) Is there any prejudice suffered by the prospective respondents if added at this time? Would the principles of natural justice be offended by adding them?

(3) Should the individual respondents be added if their corporate employers are added?

(4) Should the Board consider the conduct of the Commission with regards to its pre-referral powers? Did the Commission's conduct constitute an abuse of the Board's process? Did it violate provisions of the *Constitution Act, 1982*, including the *Canadian Charter of Rights and Freedoms*?

DECISION

The moving party's motion is granted in part. COS, Intertask and Leanne Akehurst are added as party respondents.

DOES IT APPEAR THAT EACH OF THE REMAINDER RESPONDENTS, DROUIN AND MANPOWER INFRINGED PAYNE'S RIGHTS AND SHOULD BE ADDED?

Statutory Provisions and the Law

Sections 39(2)(d) and 39(3) are the relevant provisions that contain the power to add party respondents:

> (2) The parties to a proceeding before the board of inquiry are,
>
> ....
>
> (d) any person *appearing* to the board of inquiry to have infringed the right;
>
> ....
>
> (3) A party may be added by the board of inquiry under clause (2)(d) or clause (2)(e) at any stage of the proceeding upon such terms as the board considers proper. (Emphasis added).

For a history of these subsections and the previously numbered 38(2)(d) and 38(3), see the Board's previous decision in *Payne v. Otsuka Pharmaceutical Co.*, [1999] O.H.R.B.I.D. No. 11, at paras. 63-66.

Previous panels of the Board have added, or declined to add, party respondents under this subsection. In *Anonuevo v. General Motors of Canada Ltd.*, [1996] O.H.R.B.I.D. No. 44, the Board declined to add the national union body as a respondent, noting at para. 49:

> These matters [collective agreement clause having a discriminatory effect and union impeding efforts to accommodate] relate to the merits of the complaints that

> are yet to be heard by this Board of Inquiry. We do not know if discrimination has occurred in the present case;...This Board is not asked at this time to decide on the merits of the complaint but rather the preliminary motion to add CAW National as a party.

In *Brown v. DMO Industries* (1993), 20 C.H.R.R. D/167, the Board wrote at paras. 5-6:

> Boards of inquiry have exercised their discretion in the past to add respondents where an individual or organization has been involved with the incidents surrounding the complaint, and where no prejudice would result. See, for example, *Tabar v. Scott and West End Construction Limited* (1982), 3 C.H.R.R. D/1073; *Dudnik v. York Condominium Corp. No. 216 (No. 2)*(1990), 12 C.H.R.R. D/325; *Rapson v. Stemms Restaurants Ltd.* (1991), 14 C.H.R.R. D/449.
>
> But the basis for adding such parties must be rooted in the legislation...Consequently, at this point there is nothing on the record from which the Board could draw the conclusion that the union "appears to have infringed" a right under the *Code*.

The Board also discussed the practice of adding respondents in *O'Sullivan v. Amcon Management Ltd.* (1993), 19 C.H.R.R. D/417 at para. 12:

> Boards of inquiry commonly add a person as a respondent to a complaint if it appears the respondent was involved with the factual incidents germane to the complaint and no prejudice would result by reason of the delay in becoming a party. See, for example, *Gale v. Miracle Food Mart* (April 1992)(interim decision of Ont. Bd. Inq.), (Professor Constance Backhouse) not yet reported [now reported 17 C.H.R.R. D/162]; *Tabor* [*sic*] *and Lee v. Scott and West End Construction Limited* (1982), 3 C.H.R.R. D/1073; *Dudnik v. York Condominium Corp. No. 216 (No. 2)* (1990), 12 C.H.R.R. D/325; and *Rapson v. Stemms Restaurants Ltd.* (1991), 14 C.H.R.R. D/449.

What is clear from the above quotes is that the question of *prejudice* figures greatly in the determination of whether to add a party respondent.

Before one determines the nature and degree of prejudice involved, one must look at the plain and ordinary meaning of clause 39(2)(d) and in particular the words "appearing...to have infringed the right." It is not the right of anyone, but the right of the Complainant. What is the threshold for "appearing" to have infringed the right? The Board heard a range of submissions on this subject: a balance of probabilities test; lower than a balance of probabilities – clear, cogent, unequivocal evidence that a violation of the Complainant's *Code* rights occurred; more

than a semblance unless it is based on uncontradicted evidence; some nexus or link between the prospective respondent and the violation; and a "good chance of success" threshold.

The Board believes that a balance of probabilities or *prima facie* test is too high. The Board is not making a determination on the merits after a full hearing of evidence, including *viva voce* testimony. If the Board adds a party on the basis of "appearing", that does not mean that at the end of the day, a finding of liability will be made against that party. That party will have an opportunity to mount a full defence – e.g., examine and cross examine witnesses, make submissions, etc.

In *O'Sullivan* the Board wrote that the test involves, in part, the appearance that "the respondent was involved with the factual incidents germane to the complaint." It must be more than that. There must be, on the face of the record, *some reliable evidence* on which the Board could make a finding of liability against the party. It need not be uncontroverted evidence, but merely the existence of some reliable evidence. The Board does not wish to add a party and put that party through the expense and stigma of being accused of discriminating against someone when there is no evidence, or mere allegations backed up by no evidence or patently untenable evidence. Conversely, the Board does not wish to decline to add a respondent when it "appears" that that party infringed the rights only to find out in the course of the hearing on the merits, that the "appearance" bore out.

The *Concise Oxford Dictionary* (1990: 8th ed.) defines "appear", *inter alia*, as "be evident", "seem", "have the appearance of being". "Appearance" is defined, *inter alia*, as "a semblance". The Board believes the threshold is a semblance or impression of a violation of the *Code*. Accordingly, the Board finds that the test per clause 39(2)(d) is whether, after reviewing the materials on the record, there is some reliable evidence that could lead the Board to make a finding of liability against the prospective respondent. Upon reaching that threshold, the Board will turn to the question of whether the prejudice is such that it would decline to add, notwithstanding the "appearance" of a violation.

It must be noted that the Board's *Rules of* Practice do not contain a rule dealing with an application for summary judgment or determination of an issue before trial, per Rules 20 and 21 respectively of the *Rules of Civil Procedure*. The Board should be wary of grafting extra layers or steps in what should be a faster and less expensive route than the civil litigation model. Nevertheless, in the issue at hand, it would serve little purpose to add a party and have the party go through the hearing process if at the outset, there is no evidence by which the Board could attach any liability to the party. However, as the Board does not have the benefit of a full airing of the evidence as a result of a hearing on the merits, it would also serve little purpose to place too high an onus on a moving party at the preliminary stages of the hearing process and on the basis of affidavit evidence alone.

Principles of Natural Justice and Prejudice

Regarding the other aspect of the test – prejudice suffered – the Board will not add a party, even if it "appears" to the Board that the party violated the rights of a complainant, if by doing so, that party would suffer real, substantial prejudice that is not capable of being cured by the Board (e.g. through an adjournment, further disclosure, etc.). To do otherwise would violate the principles of fairness and natural justice.

The principles of natural justice and fairness are a cornerstone of administrative law. More specifically, their importance have been recognized in human rights cases. For example, in *Re Metropolitan Toronto Board of Commissioners of Police et al. and Ontario Human Rights Commission et al.* (1979), 27 O.R. (2d) 28, the Divisional Court wrote at 53:

> The board has exclusive jurisdiction over the conduct of its procedure and the exercise of its discretion to grant the adjournment is not reviewable by this Court, provided that the board has not violated recognized principles of fairness or conducted itself in such a way as to amount to a refusal of jurisdiction, which is not the case here.

The Board case law above dealing with adding parties all mention that adding a party is subject to adherence to the principles of natural justice and fairness.

These principles were commented on in Brown and Evans, *Judicial Review of Administrative Action in Canada* (Canvasback Publishing: 1998, Toronto). At p. 9-1, the authors write:

> To participate in the making of a decision by a public body, individuals must possess sufficient information to enable them "(1) to make representations on their own behalf; or (2) to appear at a hearing or inquiry (if one is held); and (3) effectively to prepare their own case and to answer the case (if any) they have to meet." [quoting S.A. de Smith, Lord Woolf & J. Jowell, *Judicial Review of Administrative Action*, 5th ed. (London: Sweet & Maxwell, 1995) at 432] It is therefore a fundamental element of the duty of fairness at common law, and, where applicable, of the constitutionally-guaranteed principles of fundamental justice, that prior notice be given to those entitled to participate that a decision is going to be made or some administrative action taken.

See also *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307.

Adding Parties: Examination of Each Prospective Respondent

The Board will now address, *vis-à-vis* each of the prospective party respondents, the questions of whether it "appears" that a respondent has violated Ms Payne's rights, what prejudice if any would be suffered, and accordingly, whether that respondent should be added as a party.

MTCC

MTCC owns the Convention Centre and leases its premises for conventions, exhibitions, conferences, etc. MTCC leased its premises to the ICO. Of all the prospective respondents, it least "appears" to have violated Ms Payne's rights. MTCC is the most removed from the "chain of discrimination". Ms Payne admits that it was not even apprised of her allegations until she wrote to it in October, 1995 - *some sixteen months after the incident.* And after she contacted it, the record "appears" to show that MTCC acted reasonably and swiftly to deal with her concerns, including amending its licencing agreement. Notwithstanding, Ms Payne did not include MTCC as a respondent until November 19, 1996 when she filed her Amended Complaint – *almost two and a half years after the events in question.* The evidence at the motion also clearly shows that

MTCC had no involvement with the factual circumstances around the Complaint. It simply leased the premises to the ICO.

In the Board's view, what Ms Payne is requesting is a human rights occupier's liability. According to the moving party, MTCC should be added because it "appears" that it violated her rights simply by virtue of having leased the space: MTCC has an obligation to make sure that discrimination does not occur on its premises when it leases its space to thousands of lessees. How could MTCC possibly monitor such a requirement? The Board does not believe such liability can flow from the provisions of the *Code* in the case at hand. The Board believes that, had MTCC been apprised of the situation contemporaneously with the alleged incident and therefore had knowledge of the matter, it *might* have had a responsibility to look into the matter. However, here the evidence is clear and uncontroverted that MTCC was not made aware of the incident until sixteen months thereafter.

While Ms Payne admits that there is no evidence that MTCC knew or had any direct involvement in the alleged discriminatory practice against her, she submits that section 26 of the *Code* "deems" an obligation not to violate the *Code* as part of any lease agreement. MTCC says that subsection 26(3) makes it clear that the sanction of cancellation of the contract occurs *after* the breach is found by the Board, not at the time of the alleged incident. There are no reported cases on section 26.

Subsections 26(1) and (3) read:

> (1) It shall be deemed to be a condition of every contract entered into by or on behalf of the Crown or any agency thereof and of every subcontract entered into in the performance thereof that no right under section 5 will be infringed in the course of performing the contract.
>
> (3) Where an infringement of a right under section 5 is found by a board of inquiry upon a complaint and constitutes a breach of a condition under this section, the breach of condition is sufficient grounds for cancellation of the contract, grant, contribution, loan or guarantee and refusal to enter into any further contract with or make any further grant, contribution, loan or guarantee to the same person.

MTCC says that as a Crown Corporation, its contracts were deemed to include a condition that no right under section 5 will be infringed in the course of the performance of that contract. That does not mean that MTCC is liable for any violation of section 5 by one of its lessees. The Board agrees with MTCC's submissions. In this particular case, the sanction in subsection 26(3) can only come into play after a determination by the Board. Even if the Board makes a finding after a hearing on the merits of a violation of section 5, based on the wording of subsection 26(3), this permissible sanction of MTCC not entering into a future contract would be valid as against only the lessee (ICO) of the space during the 1994 ICO conference.

Based on the foregoing, the Board does not find that MTCC "appears" to have violated Ms Payne' rights and accordingly, it is not added as a party.

COS/ICO

The evidence in the motion record indicates that COS was the host and organizer of the 27th ICO in June, 1994 in Toronto. It hired Intertask to run the operations, including the Secretariat. Paul Akehurst of Intertask became the ICO Director of Operations and Leanne Akehurst became the ICO Human Resources Co-ordinator. There was a blurring or lack of distinction between their tasks as ICO's organizers and as Intertask employees. Their respective roles within ICO and Intertask appear indistinguishable.

Counsel for COS/ICO indicates that for purposes of the hearing, his client COS is prepared to accept any responsibility for the actions of ICO. That is so because ICO was a committee of COS, not a "person" under the *Interpretation Act*, R.S.O. 1990, c. I.11, as amended, and indeed it no longer is in operation. This committee ceased operating once the conference ended. The Board accepts these arguments and accordingly, declines to add a non-existent committee as a party.

What about COS? The Board has indicated further on in its Reasons that it is adding Intertask and Leanne Akehurst on the basis that Ms Akehurst, either acting in her capacity as Human Resources Co-ordinator for Intertask or as Human Resources Co-ordinator for ICO,

asked People Bank for further names, after being apprised of Ms Payne's allegation. Further, upon being refused assistance by People Bank, Ms Akehurst asked Manpower to provide additional names and also vetted the candidates as Manpower did not have a bilingual consultant to do that. This was all done without even investigating the matter, e.g. speaking to Mr. Okada. The Board is not asked to make a final determination of these legal and factual issues at this stage. The Board is satisfied that if proven, the above facts could lead to liability on the part of COS.

Counsel argues that there was no legal relationship between Ms Payne and his clients: COS; ICO; Drouin; Intertask; Paul Akehurst; and Leanne Akehurst. No privity of contract existed and no duty of care was owed to Ms Payne by his clients. Accordingly, he submits that no liability could attach and that his clients should not be added as party respondents. The Board does not agree.

The Supreme Court of Canada has consistently indicated that human rights statutes across Canada should be given a fair, large and liberal interpretation to advance and fulfill their purposes of preventing discrimination against identifiable protected groups: see *Insurance Corporation of B.C. v. Heerspink* (1982), 3 C.H.R.R. D/1163 at D/1166; *Ontario Human Rights Commission v. Simpsons-Sears Ltd.* (1985), 7 C.H.R.R. D/3102 at D/3105; *Action travail des femmes v. Canadian National Railway Company* (1987), 8 C.H.R.R. D/4210 at D/4224.

The subject-matter referred to the Board involves the allegation that Ms Payne was discriminated against in employment at the June, 1994 ICO, contrary to sections 5(1) and 9 of the *Code*. Section 5(1) reads, "Every person has a right to equal treatment with respect to employment without discrimination because of race..." Section 9 reads, "No person shall infringe or do, directly or indirectly, anything that infringes a right under this Part." Section 5(1) does not state that "no employer shall deny equal treatment to an employee". Indeed, there is no definition of "employment" in the *Code*. Rather, section 5(1) involves discrimination "with respect to employment". "Equal treatment with respect to employment without discrimination" includes more than the traditional employer-employee relationship.

In *Canada (Attorney General) v. Rosin* (1990), 16 C.H.R.R. D/441, the Federal Court of Appeal, in upholding the decision of the Canadian Human Rights Tribunal, stated at D/449:

> Remembering the broad and liberal interpretation that must be taken to this type of legislation...[C]ourts have interpreted the words [i.e., "employ" and "employment"] broadly, finding employment relationships to exist in this context where in other contexts they might not have so found.

An infringement of section 5(1) can occur between an employee and other persons who are not "employers" in the traditional sense. For example, a trade union may be held liable in two ways: where it caused or contributed to the discrimination by participating in the formulation of the work rule that has a discriminatory effect on a complainant; or if it obstructs or blocks the efforts of an employer to accommodate: see *Central Okanagan School District No. 23 v. Renaud*, [1992] 2 S.C.R. 970 at 990-991.

In the Board's view, there must be some nexus or link in the chain of discrimination between the respondent and the complainant. The Board is satisfied that this nexus "appears" to exist with regards to the parties that it has decided to add in the instant motion.

Having concluded that, the Board addresses the question of prejudice. Counsel for the COS submits that his client does not suffer the type of prejudice that Manpower is claiming and accordingly does not argue prejudice. The Board also does not see any real, substantial prejudice suffered by COS. COS was named in the Original Complaint, participated in the pre-section 36 process and in all aspects of the Board's process, including the arguing of the motion in 1999 to add it as a party.

Based on the foregoing, the Board finds that it "appears" that COS violated Ms Payne's rights and accordingly, it is added as a party respondent.

Hubert Drouin

It is undisputed that Mr. Drouin is and was at the time of the relevant incident in 1994, chief executive officer of COS/ICO. The motion materials filed indicate that Mr. Drouin met

with Mr. Akehurst after the rejection of Ms Payne by Mr. Okada that same day. Mr. Akehurst informed Mr. Drouin of the event and the allegations. He concurred with Mr. Akehurst that it would be appropriate for COS to pay Ms Payne's salary for that day and find a suitable job for her in the Congress part of the conference, which in fact COS did. What remains unanswered from the motion records filed is whether Mr. Drouin was apprised that Ms Akehurst had asked People Bank and Manpower for further names and Ms Akehurst had indeed vetted the candidates provided by Manpower which resulted in Mr. Okada picking one of them to work at Otsuka's booth. Based on the evidence, it does not "appear" that Mr. Drouin's actions, in his capacity as CEO of COS/ICO, violated Ms Payne's rights. It "appears" that he was apprised of the allegation and agreed to the proposed course of action: e.g. day's pay and a job at the Congress for Ms Payne. That conduct does not give "a semblance of" or "appearance" of a violation of Ms Payne's rights under the *Code*. Accordingly, he shall not be added as a party.

Intertask

COS/ICO sub-contracted with Intertask to organize the conference. Its president, Paul Akehurst and its Human Resources Co-ordinator, Leanne Akehurst, became the Director of Operations and Human Resources Co-ordinator of the conference, respectively. Intertask in turn hired two employment agencies, People Bank and Manpower, to staff the Congress, not the Exhibition part of the conference. The Exhibition part was comprised of booths of corporate attendees. Those attendees were responsible for manning their own booths. Of the over 2500 exhibitors, only two (Otsuka and a company from Spain) had requested assistance from COS to find people to work at their booths. COS passed this request to Leanne Akehurst, Human Resources Co-ordinator of ICO and Intertask.

The Board is satisfied that there is an "appearance" that Intertask violated Ms Payne's rights. Leanne Akehurst of Intertask was apprised by Ms Payne and Sandra Sears of People Bank that Ms Payne believed she was denied the job because she is black. For that reason, Sandra Sears declined Ms Akehurst's request to find other candidates for Otsuka's booth. Notwithstanding being told by the employment agency People Bank that it was concerned that Mr. Okada violated Ms Payne's rights, Ms Akehurst approached the other sub-contracted

agency, Manpower, to provide names. Ms Akehurst even vetted the names for the bilingual position provided by Manpower. She recommended to her father, Paul Akehurst, president of Intertask, that COS pay Ms Payne for the day's wages and find her a job at the Congress. While one could characterize that offer as thoughtful, it shows the connection of Intertask in the chain of events that forms the Complaint. The Board is satisfied that if the facts as they "appear" bear out, a finding of liability could be made against Intertask.

Turning to the issue of any prejudice suffered by Intertask, the Board's comments as stated above with regards to any prejudice of COS, apply to Intertask. Indeed, counsel for Intertask does not claim prejudice.

Based on the foregoing, the Board shall order that Intertask be added as a party respondent. The Board notes that while "Intertask Group of Companies" was named in the Original Complaint and in the notice of motion, documents filed in various motion records indicate that "Intertask Limited", a subsidiary of Intertask Group of Companies, was the company retained by COS. The Board shall add Intertask Group of Companies as a party. However, the Board directs the moving party and other parties to file written submissions within two weeks of the date of these Reasons for Decision concerning whether it is more appropriate that Intertask Limited be substituted for, or added with Intertask Group of Companies, as parties. Until such time as the Boards orders otherwise, Intertask Group of Companies shall be added as a party.

Leanne Akehurst

Of the Remainder Respondents, it "appears" to the Board that Ms Akehurst was the most directly linked to the chain of events that forms Ms Payne's Complaint before the Board. She had knowledge of the allegations of discrimination and was shown a "red flag" by Sandra Sears that one of the conference's two employment agencies did not want anything more to do with finding a person for Otsuka's booth because of their belief of a discriminatory practice. Instead of backing away or conducting an investigation, Ms Akehurst proceeded to get more involved in the chain of events. She admits to not confronting Mr. Okada. She did decide to ask for further

names from People Bank and then Manpower so that Mr. Okada could fill the job that was denied Ms Payne. She then interviewed Manpower's list of candidates as Manpower had no bilingual representative to do so. She "appears" to have stepped in the shoes of Manpower, acting as a *de facto* employment agency representative.

Such involvement "appears" to be a furtherance of, or a condonation of, the discriminatory practice against Ms Payne. Again, the Board stresses that it is not making a final determination of liability at this preliminary stage. It may well be that Ms Akehurst did not violate Ms Payne's rights, did not act in furtherance or condonation of, the discriminatory treatment. Indeed, there may not have been a discriminatory practice by Otsuka and Okada against Ms Payne. All of these issues will be determined after a full hearing on the merits. At this point, it is simply a question of "appearance" of a violation of Ms Payne's rights.

Adding A Personal Respondent When the Corporate Entity Is A Respondent

Notwithstanding the Board has determined that it "appears" that Ms Akehurst violated Ms Payne's rights, should she be added in light of the fact that her employers, Intertask and potentially COS, are parties? Her counsel submits that there is no need to add her, when her employer is not suggesting that she was acting outside her course of employment. This Board acknowledges jurisprudence from the Board approving of the view that it is not necessary to add a personal respondent when the corporate actor is a party: see *Makkar v. Scarborough (City)*(1987), 8 C.H.R.R. D/4280 at para. 33588; *Abouchar v. Metropolitan Toronto School Board* (June 8, 1995), unreported Decision No. 95-026-I. *Makkar* involved a motion by the Commission to remove personal respondents as parties. *Abouchar* dealt with a motion to add a corporate respondent and a personal respondent. Those cases advance the view that the Commission should not refer as against a personal respondent when the corporate actor is a party unless there is a real or practical need to name the individual respondent. This reasoning applies not just to the Commission when exercising its section 36 referral power but also to the Board when it determines whether it will add a party pursuant to subsections 39(2) and (3).

The Board has also recently taken the *contra* position: see *Cugliari v. Telefficiency Corp.*, [2001] O.H.R.B.I.D. No. 21 where Vice-Chair Faughnan added the chief executive officer of the Corporate Respondent as a party, writing at para. 36:

> While making no final determination on the facts of this case or whether the sections of the *Code* alleged to have been breached were in fact breached, even though Telefficiency is named as a Respondent, considering that Brunet [personal respondent C.E.O.] can be linked to the termination and a remedy is now being sought against him...the Board determined that it was appropriate to add Brunet as a Personal Respondent pursuant to section 39(3) of the *Code*.

In *Cugliari*, there "appeared" to be, per section 39(2)(d), a strong link or nexus between the personal respondent and the violation of the complainant's rights. This Board does not believe a personal respondent can use the fact that his/her employer is a party as a shield to being added as a party when that strong nexus appears to exist. It may be relevant when it comes to remedy and in the enforcement of any award. However, at this preliminary stage, if the Board finds an individual "appears" to have violated the rights of a complainant, the Board should add that individual, absent natural justice reasons for not doing so, if that strong nexus appears to exist. The Board finds that it appears that Ms Akehurst's involvement is strongly linked to the events in issue that may result in a finding of liability. This is separate and apart from the decision to add Intertask and COS. Accordingly, the Board adds Ms Akehurst as a party.

Paul Akehurst

The evidence on the motion shows that Mr. Akehurst was apprised of the situation on the same day of the events in issue, June 25, 1994. The evidence also shows that Mr. Akehurst took the recommendation of a day's salary and finding a job for Ms Payne to Mr. Drouin that night. Mr. Akehurst concurred in this course of action as a way of dealing with the allegations by Ms Payne. Mr. Akehurst also did not conduct any form of investigation into the matter. What remains unanswered is whether Ms Akehurst told Mr. Akehurst that she had asked People Bank and Manpower for further names and had vetted the candidates presented by Manpower. There is no evidence to suggest Mr. Akehurst had knowledge of this or approved this course of action, as Ms Akehurst's superior. Accordingly, at this point, the Board is not satisfied that it "appears" that Mr. Akehurst violated Ms Payne's rights. If, during the course of the hearing on the merits,

it does appear to be the case, subject to any arguments of prejudice suffered, the Board would consider a motion to add Mr. Akehurst as a party.

Manpower

The Board shall not be addressing the question of whether it "appears" that Manpower violated Ms Payne's rights in these Reasons for Decision. That is so because the Board shall not be adding Manpower as a party on the basis of actual, substantial prejudice suffered by Manpower. That prejudice involves the inability of Manpower to mount a full answer and defence due to: delay from the time of the events in question to being notified of Ms Payne's intention to add it as a party, partly attributable to Ms Payne's conduct; loss of key documentary evidence; and unavailability of key witnesses. At this point, the Board believes it would be a violation of the principles of natural justice and fairness to add Manpower as a party.

Of all the prospective respondents (the Remainder Respondents, Drouin and Manpower) only Manpower and Drouin were not named in the Original or Amended Complaints. At least with Mr. Drouin, he had notice of the matter as he was, and is, the CEO of COS, which was named in the Original Complaint. Accordingly, from June 25, 1994 (when Ms Payne was rejected by Mr. Okada), through the filing of the Original Complaint and the Amended Complaint, the pre-referral process at the Commission, to part of the proceeding before the Board, Manpower had no notice that a claim would be made against it. Indeed, Manpower was only put on notice by Ms Payne in October, 1999: when Ms Payne filed an application for judicial review of the Board's interim decision, *inter alia*, not to deal with the motion to add Manpower and Drouin on July 13, 1999 as Ms Payne had failed to give either one notice of the motion, *notwithstanding the Board had directed her to do so.* The Divisional Court wrote in *Payne* at para. 2, "Although the applicant has chosen not to follow the order of the Board in regard to service, she has not been deprived of the opportunity to bring and argue her motion."

In paragraph 15 of Manpower's factum, counsel writes:

> In subsequent Judicial Review Proceedings before the Divisional Court and in Motions for Leave to Appeal brought before the Ontario Court of Appeal and the Supreme Court of Canada Ms. Payne took the position that she was not obliged to

> serve her materials upon Manpower and Drouin and further that Manpower and Drouin had no right to respond to her motion for joinder despite the Board's rulings on those issues. These proceedings ultimately resulted in an Order of the Supreme Court of Canada dismissing her motion for leave to appeal.

Ms Payne did not dispute the above comment in either her written or oral submissions. The Board finds that part of the prejudice suffered by Manpower was as a result of Ms Payne's conduct.

What was the earliest time that Ms Payne became aware of Manpower's involvement and could have put Manpower on notice? Ms Payne says in para. 2 of her Affidavit sworn March 25, 2001 that she first became aware that Manpower was "implicated in the matter" sometime after September, 1998, when the Commission released its Section 36 Case Analysis. Notwithstanding, she still did not put Manpower on notice until one year later: in October, 1999 upon the release of the Board's Interim Decision.

Manpower disputes Ms Payne's assertion that she first learned of its involvement sometime after September, 1998. Attached to the sworn Affidavit of Manpower's Lisa McArthur is a letter dated July 14, 1994 from Mr. Akehurst to Ms Payne. It reads in part:

> Mr. Okada asked that prospective candidates be presented to him on June 25. The People Bank presented you to him. You were not selected and subsequently, another personnel agency presented a further candidate to him who was also not selected. Finally, that agency presented a fourth candidate who Mr. Okada selected for the job.

Attached to Ms Payne's March 25, 2001 Affidavit is a letter dated July 7, 1995 from Mary Anne MacArthur of the Commission. That letter indicates that she provided Ms Payne with a copy of the Response filed by Intertask and Paul and Leanne Akehurst:

> Conference/Aide Convention Services Limited of Ottawa, a subsidiary, was sub-contracted to write job descriptions, engage two Toronto-based personnel agencies and to interview, screen, brief and assign to approximately 100 casual positions for the conference only, candidates submitted by those agencies. The agencies were the People Bank and **Manpower Inc.**
>
> .....
>
> When Alicia Payne was presented by the People Bank as a substitute on June 25, Mr. Okada requested that additional candidates be presented for his consideration. **Manpower Inc.**, in its turn, presented two more candidates, one of whom was accepted. (My emphasis).

The Board agrees with the submissions of Manpower that, despite having been aware, no later than July 14, 1994, of another agency's involvement in providing additional names to Mr. Okada and that Manpower was the agency in question, no later than July 7, 1995, Ms Payne took no action. Manpower withdrew the part of its submission and corresponding exhibit that Ms Payne specifically told the Commission not to investigate Manpower and accordingly does not enter into the Board's determination of this motion. However, the Board does accept from the evidence at bar that Ms Payne made no attempts to ask the Commission to investigate Manpower or amend her Complaint to add Manpower. Ms Payne waited until October 7, 1999 – over five years after the June incident at issue – before putting Manpower on notice.

Prejudice Suffered and Steps Taken by Manpower

The Board will now address the nature of the prejudice suffered by Manpower as a result of those five years having passed without receiving notice. The five years *per se* do not amount to a violation of the principles of natural justice. It is the nature of the prejudice suffered, due to the five year delay in receiving notice, as a result of Ms Payne's actions, that constitutes the violation of Manpower's right to full answer and defence.

The Affidavit of Lisa McArthur of Manpower, sworn April 17, 2001, outlines in detail the considerable efforts Manpower took to ascertain its involvement, gather and preserve evidence in order to mount a full defence. Short of hiring a private investigator to locate unavailable witnesses, the Board is not aware of any further steps that Manpower could have taken, upon being put on notice in October, 1999.

Ms McArthur deposes that, despite its considerable efforts, Manpower has been unable to locate any documentary evidence that it provided candidates to Otsuka or Intertask or was even involved in providing people at the ICO. It is also unable to ascertain what Manpower employee was involved in the events in question. Of those who are listed as potential witnesses, it has been either unable to locate them or those that were located had no knowledge of the events in question.

Ms McArthur deposes of the following steps taken to gather information and preserve evidence:

(1) five days after being put on notice by Ms Payne, Ms McArthur contacted the company's Queen St. office and asked that records be searched of any temporary employee provided to Otsuka, ICO, COS, Intertask or MTCC. No records appeared;

(2) she contacted Manpower's payroll/credit coordinator and requested that records be searched regarding the above mentioned companies. No records appeared;

(3) she contacted Manpower's Information Technology Response Centre and asked that their records be searched regarding the above companies. She was advised that they no longer retained records as far back as 1994;

(4) she asked Manpower's counsel to write to Commission counsel regarding any relevant information that the Commission may have regarding Manpower's involvement. Manpower's counsel also wrote to Ms Payne, counsel to Otsuka and Okada, and to Mr. Baril, counsel for ICO, COS, Hubert Drouin, Intertask, Paul Akehurst and Leanne Akehurst, asking for any relevant information concerning Manpower's involvement. Commission counsel responded that she:

> had gone through the Commission's substantial investigation file and could find no additional relevant material aside from the information already canvassed in the section 36 case analysis at paragraph 26.
> ....
> More specifically, there is no reference to the name of the individual from Manpower with whom Leanne Akehurst dealt the morning of June 25, 1994, nor do we know the name of the individual from Manpower who was successfully placed with Otsuka Pharmaceuticals for the duration of the conference. In addition, there is no record that the Commission ever made contact with or spoke to anyone from Manpower with respect to their alleged involvement in these events.

Mr. Baril responded that Mr. Akehurst had no information about who, from Manpower, acted as human resources coordinator in providing services at the conference. Ms Akehurst recollected only that the Manpower representative was a "Mary", a woman in her mid to late 40s, and dealing with a woman who was the manager of the downtown Manpower office. No information came from Mr. Drouin, or COS/ICO. No response was received from Ms Payne, or counsel to Otsuka and Mr. Okada.

(5) Ms McArthur spoke to the Regional Manager for Manpower's downtown office in 1994, following up on the lead from Ms Akehurst. The manager could not identify the "Mary" person. She gave Ms McArthur the names of managers at the office in 1994 who might have some knowledge;

(6) She contacted Manpower's Human Resource Specialist to search the database for the above managers. One number was provided but when called, it was out of service.

(7) She finally got in touch with a former Manpower manager, Ms Flanagan, who had not been involved with that conference.

(8) She contacted Manpower's accounting department and asked them to search for Deirdra Johnson, "Mary" or "Sharon". A search could not be done without surnames.

(9) She sent three letters to Ms Johnson's last known address. No response was received.

(10) Ms McArthur reviewed employees' files for 1994-98 from storage. The "Mary" was still not identified but she determined that "Sharon" *might* be Sharon Thorpe.

(11) She sent Ms Thorpe a letter by registered mail. Canada Post indicated that it could not be delivered and had been returned to sender.

(12) She tried to locate the two persons associated or formerly associated with Manpower named in the statement of People Bank's Stephen Jones: Bob Goodman and Tammy Johns.

(13) Ms McArthur contacted Mr. Goodman. He advised her that he has no knowledge of the events giving rise to Ms Payne's Complaint or of the 1994 ICO. He does not know who was involved from Manpower's side.

(14) Tammy Johns, currently Manpower's Director of Canadian Operations, filed an affidavit on this motion, deposing that she has no personal knowledge of, or involvement in, the 1994 ICO and the incidents concerning Ms Payne. She is not aware of who, if anyone, was involved in the conference on Manpower's behalf.

(15) Ms McArthur checked the microfiche records maintained by Manpower. There was no record of any person being placed by Manpower with Otsuka or any of the other listed companies during the conference. There was a record of a temporary employee named Mar Bystrova who was placed with the MTCC Visitors Association at Queen's Quay (not at the ICO conference itself).

(16) Ms McArthur contacted Ms Bystrova who confirmed that she had worked at the visitor's booth for tourism but not at the ICO conference. She advised that her Manpower contact was "Amy".

(17) Ms McArthur then did a search of terminated employees' files from 1994-98 to try to locate "Amy". She found no such record. A search of the Human Resources system by computer produced no information regarding any employees named Amy in June, 1994.

(18) She checked Maxviewer (a database of information) to see if any of the listed companies could be found. She found an invoice from Manpower's U.S. affiliate for Otsuka in 1995. However, no invoice relating to the 1994 ICO conference was found.

(19) She also contacted Manpower's pension administrator to ascertain the current addresses for Sharon Thorpe and Deidra Johnson. The administrator did not possess information that would help in that regard.

(20) She used the Canada 411 internet phone directory to ascertain listings for Ms Johnson and Ms Thorpe. She contacted a Ms Johnson and a Ms Thorpe, but they were not the right Johnson and Thorpe: neither had ever worked for Manpower.

The Board accepts Manpower's submission that, had it been given timely notice of a potential claim, it would have been in a position to properly investigate the matter, take steps to preserve evidence, including the location and names of potential witnesses. Witness statements could have been taken before memories faded. Persons leaving the employ of Manpower could have left forwarding contact information. Substantial prejudice has befallen Manpower as a result.

The Board also accepts Manpower's submission that Ms Payne bears significant responsibility for the situation in which Manpower finds itself. The Board finds, based on the evidence filed on the motion, that Ms Payne had knowledge of another employment agency's involvement in finding other candidates for Otsuka no later than July 14, 1994, and knowledge that the agency was Manpower no later than July 7, 1995. Ms Payne should have put Manpower on notice no later than July, 1995: over six years ago. The Board further finds that Ms Payne had further opportunities to notify Manpower once the matter had been referred to the Board, but chose not to.

A respondent's right to defend itself is as important as a complainant's right to have a full and fair hearing of the complaint in issue. The combination of the delay in time as a result of the Complainant's own conduct has denied Manpower the fundamental right to participate in the hearing in a meaningful and effective way. Accordingly, even if it did "appear" that Manpower violated Ms Payne's rights, and even if it did so in fact and in law, the fundamental right to provide full answer and defence in this proceeding is paramount.

In *Blencoe*, Bastarache J., writing for the majority of the Supreme Court of Canada, states at para. 115:

> I would be prepared to recognize that unacceptable delay may amount to an abuse of process in certain circumstances *even where the fairness of the hearing has not been compromised*...I caution that in cases where there is no prejudice to hearing fairness, the delay must be clearly unacceptable and have directly caused a significant prejudice to amount to an abuse of process. It must be a delay that would, in the circumstances of the case, bring the human rights system into disrepute. (My emphasis).

In the case at bar, unlike in *Blencoe*, the fairness of the hearing has been compromised and affected (*vis-à-vis* Manpower). Significant prejudice is evident. The result is that Manpower cannot properly defend itself. Further, it is not curable by anything the Board can do or order, other than not adding it as a party.

The Commission's Pre-Referral Conduct: Abuse of Process and Constitutional Law Issues

Submissions

Ms Payne seeks an Order of the Board, "pursuant to Section 39 of the *Code*, Section 23(1) of the *SPPA* [*Statutory Powers Procedure Act*, R.S.O. 1990, c. S.19, as amended ("*SPPA*")] and the *Constitution*, including the *Charter*," to "restore" the Remainder Respondents as parties and to add Mr. Drouin and Manpower as parties, and to amend the Complaint accordingly. Ms Payne argues that violations of the *Constitution Act, 1982* and the *Charter* entitle her to the remedy requested. However, she does not appear to be asking that the Board strike certain sections of the *Code* as being unconstitutional. In oral submissions, she asks for an Order that the Commission "misused" and "misapplied" its section 36 powers by "removing" the

Remainder Respondents in the referral. Such an action was of no force and effect and the Remainder Respondents should be automatically restored. She submits that the Board is a "court of competent jurisdiction" and can give her a subsection 24(1) *Charter* remedy. She also argues that the Commission's actions have deprived some complainants from the full protection of the *Code*.

Responding parties to the motion reject Ms Payne's submissions regarding abuse of the Board's process and constitutional arguments. Commission counsel argues that it is not an abuse of the Board's process per section 23(1) of the *SPPA* if the Commission misused its section 36 power, which he says it did not. Counsel asserts that Ms Payne is "using section 23 to revisit the Commission's [section 36 referral] decision". Ms Payne has not met the test for showing an abuse of the Board's (not the Commission's) process: i.e., the Commission's handling of her complaint pre-referral "has caused prejudice of sufficient magnitude to affect the fairness of the hearing". Her constitutional arguments are another example of her dissatisfaction with the Commission's section 36 actions. The proper forum for those issues is the Divisional Court, according to counsel.

Analysis

In *Payne*, the Divisional Court explicitly stated at para. 5:

> The Board does not have jurisdiction to overrule or exercise appellate or review judgment as to what the Commission decided to do under the provisions of sections 36 and 37 of the *Code*. However the Act gives it jurisdiction in the exercise of independent authority to deal with motions under section 39(3) at any stage of the inquiry without regard to what the Commission may have previously decided.

In reversing the Board's decision that it lacked the jurisdiction to add the parties where the Commission had decided to not refer as against those particular respondents, the Court remitted the matter to the Board on the merits of whether to add the respondents in question. That is what the Board has done here. The Board finds that Ms Payne's allegations of Commission misconduct and misuse of section 36 are outside the Board's jurisdiction. The Board does not supervise the Commission: the Divisional Court has that responsibility on an application for

judicial review. As the Court noted in *Payne*, she chose to judicially review the Board's decision, not the Commission's section 36 referral decision and section 37 reconsideration decision. It was open to Ms Payne to judicially review the Commission's conduct then, as it is now.

The Divisional Court and the Board have consistently stated that it is outside the Board's purview to supervise the Commission's pre-referral conduct. For a detailed review of this point and the issue of abuse of the Board's process, see Vice-Chair McKellar's decision in *Anonuevo v. General Motors of Canada Ltd.*, [1998] O.H.R.B.I.D. No. 7. See also *Chan v. Ontario Power Generation Inc.*, [2000] O.H.R.B.I.D. No. 7, at para. 20; *Jeffrey v. Dofasco Inc.*, [2001] O.H.R.B.I.D. No. 8 at para. 12; *Jeffrey v. Dofasco Inc.*, [2000] O.H.R.B.I.D. No. 11, at para. 9; *Bryan v. PMI Food Equipment*, [1997] O.H.R.B.I.D. No. 13, at paras. 26-32; *Nelson v. Durham Board of Education*, [1997] O.H.R.B.I.D. No. 9, at paras. 32-38. The Board does not inquire into the legality or compliance *per se* of the pre-referral process, but rather, the effects of the Commission's process on the matter before the Board. As stated by the Board in *Anonuevo*, at para. 91, pre-referral Commission conduct may be relevant to an abuse of process argument pursuant to section 23(1) of the *SPPA* if it results in actual prejudice of the magnitude of which adversely affects the fairness of the hearing before the Board. The Board finds that Ms Payne has not met the test for establishing an abuse of the Board's process.

Regarding Ms Payne's constitutional argument, the Board does not find merit in it. As the Divisional Court noted in *Payne* at para. 1:

> There is no legitimate Charter issue for consideration on this application for judicial review. Any Charter matter is raised for the first time in the applicant's material before this Court and with a background that would make entry into this area too uncertain to justify consideration at this stage. It is entirely unsure just what remedy is sought for what alleged Charter breach and by whom.

The Board also finds her constitutional arguments unclear. It seems from Ms Payne's motion record and oral submissions that she is not requesting that the Board strike sections of the *Code* as being unconstitutional. Rather, she is using a constitutional basis for her arguments that the Commission's pre-referral conduct constituted an abuse of process, and necessitate having the Remainder Respondents "restored" as parties and Drouin and Manpower added as parties. For

the foregoing reasons dealing with abuse of process, the Board believes that the proper forum for Ms Payne's concerns about the way the Commission handled her Complaint, pre-referral period, constitutionally based or otherwise, is the Divisional Court on an application for judicial review or a complaint to the Ontario Ombudsman.

ORDER

Upon granting Ms Payne's motion in part, the Board orders:

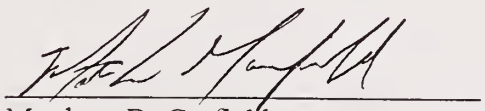
(1) COS, Intertask and Leanne Akehurst are added as party respondents. The Amended Complaint and title of proceedings are amended accordingly;

(2) The parties are to file written submissions with the Board within two weeks of the date of this Decision and Order regarding whether Intertask Limited should be substituted, or added with, Intertask Group of Companies, as a party;

(3) The Commission and Complainant shall serve and file their respective Statements of Facts and Issues within two weeks of the date of this Decision and Order and provide any additional disclosure. The Respondents shall serve and file their Responses and provide any further disclosure within one month of the date of this Decision and Order. Any Reply by the Commission and/or the Complainant shall be due one week thereafter; and

(4) The Deputy Registrar shall contact the parties to arrange a Pre-Hearing Conference call to deal with the setting of hearing dates and pre-hearing matters.

Dated at Toronto, this 24th day of October, 2001.



Matthew D. Garfield
Chair